U.S. Department of Labor

Office of Administrative Law Judges
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CASE NUMBERS: 2001-LHC-2288
2001-LHC-2289

OWCP NUMBERS: 18-67646
18-73890

In the Matter of :

RICHARD CARPENTER,
Claimant,
v.

CALIFORNIA UNITED TERMINALS and **STEVEDORING SERVICES OF AMERICA**,
Employers,
and

AMERICAN HOME INSURANCE and **HOMEPORT INSURANCE COMPANY,**
Insurers,
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in Interest.

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For the Claimant	For Stevedoring Services of America and Homeport Insurance Company	For California United Terminals and American Home Insurance

Before: **Paul A. Mapes**
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises from two claims under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Longshore Act" or "the Act"). A trial on the merits of these claims was held in Long Beach, California, on February 6,

2002. All parties except the Director were represented by counsel and the following exhibits were admitted into evidence: Claimant's Exhibits (CX) 1 to 65, Stevedoring Services of America Exhibits (SSX) 1-26, and California United Terminals Exhibits (CTX)1-24. All parties except the Director filed timely post-trial briefs.

BACKGROUND

Richard Carpenter (hereinafter "the claimant") was born on February 16, 1937 and began working as a longshoreman in 1959. CX 5, CX 11 at 12, Tr. at 61-62. In 1980, the claimant had a work-related back injury that caused him to be off work until the middle of 1984. CTX 22 at 36-40. A short while later, he transferred to International Longshore and Warehouse Union (ILWU) Local 63 so that he could work as a marine clerk and thereby avoid the more physically strenuous waterfront jobs. Tr. at 63, CX 35 at 109, CTX 22 at 24, 40-41. After becoming a marine clerk, the claimant received his daily job assignments from the dispatcher at Local 63 and he generally preferred to work the "second shift," which began at 5:00 p.m. and concluded at 3:00 or 4:00 a.m. the following day. CX 35 at 128-29. While working as a marine clerk in 1991, he suffered a second back injury and was unable to return to work for approximately eight months. CTX 22 at 43-44. In addition, in 1995, he suffered another back injury and was off work from May to December of 1995. CTX 22 at 49. After returning to work in 1996, he was able to perform all the different types of jobs available to marine clerks and in calendar year 1997 earned approximately $134,000. Tr. at 80-81, CX 64.

While working as a floor-runner clerk between 1:30 a.m. and 2:00 a.m on March 10, 1998, the claimant slipped and fell as he was walking backward in a dock-side container yard operated by a unit of Stevedoring Services of America (hereinafter "SSA").[1] Tr. at 92-94, CX 35 at 131-33, CX 36, CX 11 at 11-13. He landed on his buttocks and struck the ground with both his left arm and right thumb. *Id.* The claimant went home and went to bed, but later the same day was examined by Dr. John O'Hara, a board-certified orthopedic surgeon. CX 11. When examined by Dr. O'Hara, the claimant complained of low back pain and was unable to stand fully straight up. Dr. O'Hara's examination of the claimant's cervical spine indicated that the claimant could rotate his neck only 30 degrees bilaterally and could tilt it only 15 degrees. According to Dr. O'Hara's report, x-rays of the claimant's cervical spine showed degenerative disc disease at multiple levels, but did not reveal any apparent acute injury. Likewise, x-rays of the claimant's lumbar spine showed "significant arthritic changes" but did not contain evidence of any compressive fractures. The report also indicates that the claimant told Dr. O'Hara that when he fell, he held his neck forward "in a very aggressive fashion" in order to prevent his head from hitting the ground. CX 11 at 15. Dr. O'Hara noted that the claimant's right-side low back pain extended to the foot of his right leg and described the condition as being the claimant's most significant problem, but added that generalized arthritic changes in the claimant's left elbow, right hand, low back and cervical spine had all been "lit up and

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1. Because this work shift began on the afternoon of March 9, 1998, some of the records in this case erroneously indicate that the claimant's injury occurred on March 9. However, all the parties agree that the injury actually occurred on March 10, 1998.

aggravated" by the accident. CX 11 at 15. Dr. O'Hara concluded that the claimant should remain off work for at least three weeks and suggested that further tests might be necessary to fully diagnose the extent of the claimant's injuries. CX 11 at 15-16. In the interim, Dr. O'Hara diagnosed the claimant's injuries as including cervical and lumbar sprains. CX 2 at 2, CX 65 at 8. In a questionnaire the claimant completed just before seeing Dr. O'Hara, he listed a "stiff neck" as being one of his post-accident symptoms. CX 36.

On March 16, 1998, the claimant was interviewed by a claims examiner for Homeport Insurance Company. SSX 20. According to the transcript of a tape recording of that interview, the claimant acknowledged that the March 10 accident had injured his left arm, buttocks, lower back and right thumb but did not mention any injury to his neck. SSX 20 at 375-76.

On April 1, 1998, the claimant was examined at the employer's request by Dr. James T. London, a board certified orthopedic surgeon. CX 30. According to Dr. London's report, the claimant complained, *inter alia*, of pain in his right hand and thumb as well as constant severe low back pain that radiated down his right leg to his ankle but denied having any neck pain. CX 30 at 64-66. In the report, Dr. London also noted that when he had evaluated the claimant for a May 1995 injury he had determined that the claimant was suffering from longstanding spondylolysis and spondylolisthesis with lumbar disc degeneration, herniation, and foraminal stenosis. Dr. London further noted that he had also evaluated the claimant following an August 1991 injury and that at that time he had opined that the claimant should refrain from work that required heavy lifting or carrying, repeated bending or stooping, forceful pushing or pulling, or prolonged standing. Dr. London concluded that the March 10, 1998 accident had cause a lumbosacral strain, a left arm contusion, and an aggravation of carpometacarpal joint arthritis in the claimant's right thumb. He also concluded that further medical treatment was necessary and that the claimant should participate in a physical therapy program for the next three weeks and remain off work for four weeks.

On April 6, 1998, Dr. O'Hara again examined the claimant and issued a report in which he noted that the claimant's "most significant problem" was intermittent pain that ran into his right leg and extended down to his knee. CX 12. Dr. O'Hara indicated that he suspected that the claimant's L5 disc was "significantly compressed" and concurred with Dr. London's recommendation that the claimant undergo an MRI of his lumbar spine. *Id.*

On April 8, 1998, the claimant underwent an MRI of his lumbar spine at Long Beach Medical Imaging Clinic. CX 13. According to a report signed by two radiologists, the MRI showed abnormalities at all levels of the claimant's lumbar spine, including "moderate" to "moderately severe" left-sided neural foraminal stenosis at L5 which suggested the potential for left L5 nerve root encroachment and even the possibility of a right-sided nerve root encroachment. CX 13 at 21.

On April 27, 1998, Dr. O'Hara re-examined the claimant. CX 14. In his report, Dr. O'Hara noted that the claimant was still suffering from occasional pain in his back as well as "a lot of stiffness" after sitting for prolonged periods, but that the claimant's cervical spine "seems to have improved significantly." CX 14 at 23. Dr. O'Hara recommended that the claimant undergo approximately three or four weeks of physical therapy. CX 14 at 24.

When Dr. O'Hara examined the claimant on May 28, 1998, the claimant reported that his left elbow and cervical spine symptoms had significantly improved, but that his right thumb was still painful and that his back was still his major problem. CX 15. Dr. O'Hara concluded that the claimant might be able to return to work within the following month. On June 18, 1998, the claimant again reported to Dr. O'Hara that his cervical spine and left elbow conditions were improving. CX 16. However, Dr. O'Hara's examination of the claimant's back indicated that the claimant's ability to move his back was "quite limited." Dr. O'Hara recommended that the claimant continue receiving physical therapy and concluded that the claimant should not return to work until after August 1, 1998. *Id*. On July 9, 1998, Dr. O'Hara reported that the claimant was continuing to undergo physical therapy two or three times a week and that he was not complaining "very much" of neck discomfort. CX 17. Dr. O'Hara opined that the claimant's condition was progressing satisfactorily and suggested that he would be able to return to "light duties" in approximately four to six weeks. *Id.*

On May 28, 1998, the claimant was again examined by Dr. London. CX 31. In his report, Dr. London reviewed the results of the MRI performed on April 8, 1998 and noted that the claimant's symptoms included complaints of constant low back pain that radiated into his right leg and worsened with various physical movements, frequent pain at the base of his right thumb, and "rare stiffness" in his neck with lateral rotation. Dr. London recommended that the claimant continue receiving physical therapy.

On July 10, 1998, Dr. London re-examined the claimant. CX 32. During the examination, the claimant told Dr. London that he was taking approximately one Vicodin tablet a day for pain and receiving physical therapy treatments two days per week, but that his condition was improving. Dr. London concluded that the claimant's injury did not require any sort of surgery, but that he should continue to receive physical therapy and would be able to return to work as a marine clerk in about six weeks.

On August 13, 1998, Dr. O'Hara reported that the claimant was experiencing only "slight discomfort" in his neck and that his other conditions had improved to the point that he had "cut down dramatically" his use of his pain medication, Vicodin. CX 18. Dr. O'Hara further noted that the claimant's physical therapist had started the claimant on a work-hardening program that was designed to prepare him to return to his duties as a marine clerk. CX 18. According to Dr. O'Hara's report, it was his understanding that one of the jobs the claimant performed as a marine clerk required him to get in and out of a truck as many as 30 times an hour and that another marine clerk job required the claimant to stand for six to eight hours a shift to check as containers were moved on and off of ships. A third job was described as requiring the claimant to engage in prolonged standing and to climb up an 18 inch curb to check trucks in and out of a yard. A fourth job purportedly required the claimant to climb into the holds of ships to identify cars. Dr. O'Hara concluded his report by predicting that the claimant would be able to return to his ususal duties as a marine clerk by October 1, 1998. However, in a report dated September 17, 1998, Dr. O'Hara concluded that, despite continuing improvement in the claimant's neck and back conditions, the date that the claimant could return to work would have to be postponed to November 1, 1998. CX 19. On October 12, 1998,

Dr. O'Hara issued another report that indicated that the claimant could not return to work for another four to six weeks. CX 20.

On November 6, 1998, the claimant was again seen by Dr. London. CX 33. According to Dr. London's report, the claimant indicated that he was still feeling intermittent lower back pain, occasional stiffness in his neck and constant soreness in the carpometacarpal joint of his right thumb. When Dr. London examined the claimant's neck, he observed that the claimant had a full range of motion without pain and noted that there was no tenderness. After describing the results of his examination of the claimant's right thumb and thoracolumbar spine, Dr. London concluded that the claimant's condition had become permanent and stationary. He described the claimant's injury as involving a lumbosacral strain, a contusion to his left arm, and a sprain to his right thumb, but did not indicate that he believed that there had been any injury to the claimant's cervical spine. Dr. London recommended that the claimant complete his work- hardening physical therapy program and return to work on December 12, 1998. At the report's conclusion, Dr. London recommended that the claimant not engage in work that involves heavy lifting or carrying, repeated bending or stooping, forceful pushing or pulling, or prolonged standing. Dr. London also noted that these restrictions would have been appropriate after the claimant's 1980 work injury and asserted that the March 10, 1998 accident did not warrant any additions to these pre-existing restrictions.

In a report dated November 24, 1998, Dr. O'Hara noted that the claimant was still experiencing intermittent pain in his mid-back, but that his low back "seems to be OK." CX 21. After describing the results of his physical examination of the claimant's cervical spine and right thumb, Dr. O'Hara concluded that the claimant could return to work on December 10, 1998. CX 21.

As authorized by Dr. O'Hara, the claimant returned to work as a marine clerk on December 12, 1998. CX 64 at 385. According to the claimant, after he returned to work he attempted to perform all the various types of marine clerk jobs that he had performed prior to his March 10, 1998 injury, including floor runner, yard clerk and dock clerk jobs. Tr. at 110, CTX 22 at 58-59, 102-03, 111.

On January 9, 1999, the claimant was again examined by Dr. O'Hara. CX 22. At that time, the claimant told Dr. O'Hara that he had followed work restrictions against repetitive bending, stooping or walking, but still had "a considerable amount" of low back pain in the mornings and evenings. He also informed Dr. O'Hara that he was having "increasing symptoms" in his neck and that the symptoms were radiating along the right side of his neck into his shoulder. *Id.* Dr. O'Hara concluded that the neck symptoms were "reasonably associated with" the March 10, 1998 injury and recommended that the claimant have an electromyogram and nerve conduction studies to determine if there was any cervical radiculopathy. *Id.*

On January 20, 1999, Dr. Richard S. Gluckman, a board-certified neurologist, conducted nerve conduction studies on both of the claimant's upper extremities. CX 23. Dr. Gluckman reported that the results of the tests he performed were "completely within normal limits." However,

he also concluded that the "possibility of proximal lesions or double crush syndrome" could not be excluded. *Id.*

On February 1, 1999, Dr. O'Hara reported that the claimant was continuing to work as a marine clerk, but that he was experiencing "severe pain" when he rotated his neck in the early morning hours and that the pain radiated to his right shoulder. CX 24. Dr. O'Hara noted the conclusions in Dr. Gluckman's report and recommended that the claimant have an MRI of his cervical spine to determine if there were any compressive nerve lesions or other abnormalities. The MRI was performed on February 22, 1999. CX 25. The radiologist's report indicated that the claimant had a "mild to moderate hyperlordosis" in his cervical spine, that there were "mild to moderate degenerative joint and spondylotic" changes at many levels of the claimant's cervial spine, and that the most severe spinal and bilateral neural formaminal stenosis was at the C5-C6 level. *Id.*

On March 5, 1999, Dr. O'Hara issued a report in which he noted that the claimant was still having "cervical spine pain and discomfort." CX 26. The report described the results of Dr. Gluckman's tests as being within normal limits and indicated that the MRI had shown "the expected degenerative disc changes at C5-6 and C6-7." According to the report, these factors gave Dr. O'Hara the impression that the claimant's pre-existing degenerative disc disease resulted in a "vulnerable neck" that was "aggravated" by the claimant's March 10, 1998 work injury. Dr. O'Hara recommended that the claimant be given another three to four weeks of physical therapy for his neck condition and suggested that the claimant's condition would be permanent and stationary within the next six weeks.

On April 30, 1999, the claimant was again examined by Dr. O'Hara. According to Dr. O'Hara's report, the claimant indicated that because of "self-imposed and real restrictions" on the kinds of marine clerk jobs he could perform, he was working "only half the time." CX 27. However, the report indicates, the claimant was still able to work as a gate clerk. The claimant also reported to Dr. O'Hara that he had a constant "mild" pain in his neck that quickly became a "moderate" pain with any work activity involving standing, sitting, or rotating his neck. In addition, the claimant described his back pain as being mild to moderate when inactive, but severe when bending, lifting, sitting or standing for more than 40 minutes.

On June 18, 1999, the claimant reported to Dr. O'Hara that he had been working as a "gatekeeper" and was continuing to have "stiffness" in both his neck and back. CX 28. According to Dr. O'Hara's report, the claimant was treating these symptoms by taking two Motrin tablets a day. Dr. O'Hara strongly recommended that the claimant be authorized to resume physical therapy treatments and disagreed with Dr. London's opinion that such treatment was unnecessary. Dr. O'Hara also described the claimant as being "motivated" and wishing to continue to work as a longshoreman.

On July 1, 1999, Dr. O'Hara issued a "Permanent and Stationary Report" concerning the claimant's March 10, 1998 injury. CX 29. In the report, Dr. O'Hara noted that the claimant was at that time working as a gate or yard clerk and did not have to move around very much to perform his duties. Dr. O'Hara further indicated that the claimant was no longer having any particular problems

with his elbow and that he had only occasional pain in his right thumb. However, the report indicated, the claimant was still experiencing occasional neck and back pain that would become severe with abrupt changes of position. Dr. O'Hara concluded that the claimant's condition had become permanent and stationary and that he could continue to work as a marine clerk so long as he did not have to perform work activities that required repetitive bending, stooping, crawling, or twisting. In addition, Dr. O'Hara further precluded the claimant from engaging in work that required repetitive hyperextension of his neck or prolonged standing or sitting. Dr. O'Hara concluded that the claimant's neck injury had resulted in a five percent "whole person" impairment under the Fourth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (hereinafter the "AMA Guides"). In addition, Dr. O'Hara rated the claimant's back injury as resulting in an additional five percent whole person impairment under the AMA Guides. Both of these impairments were attributed by Dr. O'Hara to the claimant's March 10, 1998 injury.

According to the claimant's trial and pre-trial deposition testimony, after he returned to his regular work as a floor runner in December of 1998, he had so much difficulty performing his job duties that other longshore workers would help him by letting him go home after working only four hours. CTX 22 at 58, Tr. at 109-110, 220-22. Eventually, however, the co-workers tired of his requests to be allowed to leave early and "a couple of the supervisors" told him he shouldn't be taking any more floor-runner jobs. CTX 22 at 58-59, 102-03, 111, Tr. at 110, 117, 133-34, 221, 235-26. As a result, he testified, he eventually concluded that he was not able to perform the more physically demanding marine clerk jobs and told his union dispatcher that the only marine clerk jobs that he would accept were gate and tower clerk jobs. CX 35 at 155-56, Tr. at 109-112, 117, CTX 22 at 58-59, 102. The claimant also testified that even the gate and tower clerk jobs made it necessary for him to take pain medications on a daily basis. CX 35 at 157-58, Tr. at 120, 188, 219. In addition, he asserted, he was unable to perform such jobs more than three or four days a week. CX 35 at 157-58. According to the claimant's payroll records, he was frequently hired for yard and dock clerk jobs until the middle of September of 1999, when the number of jobs in those categories declined dramatically and the number of tower and gate clerk jobs substantially increased. CX 64 at 387-396.

On April 14, 2000, the claimant was again examined by Dr. London. CX 34. In a report dated April 25, 2000, Dr. London indicated that during the examination the claimant told him that his condition had not changed since his last examination by Dr. London on November 6, 1998. The report further indicates that the claimant was taking Vicodin for pain and Flexeril as a muscle relaxant but still had intermittent low back pain that worsened with forward bending or lifting. The pain was most severe, according to the claimant, if he engaged in twisting or prolonged sitting or standing. The claimant also reportedly indicated that on rare occasions he experienced stiffness in his neck and occasionally felt pain or stiffness in his right thumb. Dr. London's physical examination of the claimant's cervical spine found a full range of motion except for lateral rotation, which measured 55 degrees to the right and 50 degrees to the left. Likewise, all ranges of motion in the claimant's lumbar spine were normal except forward flexion, which was measured as being 70 degrees. Dr. London concluded that the claimant's condition was still permanent and stationary and indicated that he continued to be of the opinion that the claimant should adhere to the same work restrictions that he set forth in his report of his November 6, 1998 examination of the claimant. In addition, Dr. London opined that these restrictions were not necessitated by the claimant's March 10, 1998 injury,

but were instead due to prior injuries. He added that in his opinion, the claimant did not suffer any injury to his cervical spine during the March 10, 1998 injury. He also opined that if were determined that the claimant did suffer any permanent disability as a result of the March 10, 1998 injury, such disability was made materially and substantially greater by the impairments that existed prior to that injury.

While working as a gate clerk for California United Terminals (CUT) on July 29, 2000, the claimant felt a sudden sharp pain in his back and right leg as he "jerked" or "lunged" downward in an attempt to grab a document that had fallen from his grasp as he was sitting on a stool. CTX 22 at 66-67 ("jerked"), CX 43, CX 45, Tr. at 134-39 ("lunged"), CX 50. According to the claimant, the pain was immediate and "excruciating." CTX 22 at 109. Two days later, the claimant sought treatment from Dr. O'Hara. CX 50. According to Dr. O'Hara's report, when he initially examined the claimant, he had "severe" back pain at L5-S1 and radicular pain down the back of his right leg when given a straight leg raising test. Dr. O'Hara concluded that the claimant had "significant symptoms" that "probably" were the result of a herniated disc at L4-5 or L5-S1. He recommended that the claimant stay off his feet for a few days and suggested that it might be appropriate for the claimant to undergo an MRI of his lumbar spine.

On August 7, 2000, the claimant was again examined by Dr. O'Hara, who reported that the claimant had improved but still had radicular symptoms. CX 51. As well, Dr. O'Hara concluded that the claimant's symptoms precluded the claimant from working as a marine clerk and that these symptoms were "reasonably associated" with his July 29, 2000 injury.

In a report dated September 14, 2000, Dr. O'Hara noted that the claimant's March 10, 1998 injuries had prevented him from returning to work in some categories of marine clerk jobs and characterized the July 29, 2000 worsening of the claimant's symptoms as being the result of a "minimal accident" that was "part of the ongoing deterioration" that had occurred during the claimant's waterfront employment. CX 52. Dr. O'Hara then recommended that the claimant be put into a "quality, goal-oriented" physical therapy program with the aim of allowing the claimant to return to his usual work. He added, however, that there was possibility that the claimant would ultimately be unable to return to even "light sedentary work activity."

Dr. O'Hara next examined the claimant on October 18, 2000. CX 53. In his report of the examination, Dr. O'Hara noted that the claimant was unable to perform even gate or tower clerk jobs and was therefore not working. The report also indicated that the claimant was experiencing pain and soreness in his lower back and that the pain increased if he stood for more than a few minutes at a time and would become "intolerable" if he engaged in prolonged sitting, standing or walking. Dr. O'Hara's physical examination of the claimant's lumbar spine revealed that the claimant had a "significant lack of motion" in terms of his ability to extend, rotate or bend to the right or left. The report also noted that the claimant manifested pain with all movements of his lumbar spine. Dr. O'Hara concluded that the claimant was unable to perform "even the lightest of job activities," and remarked that he was "approaching permanent and stationary status."

On October 30, 2000, the claimant was again examined by Dr. London. CX 57. At that time, according to Dr. London's report, the claimant had constant low back pain that radiated to the right side of his lower back, weakness in his right leg when pain radiated to that leg, lower back stiffness that was worse in the mornings and after prolonged sitting, and a "little soreness" in his neck. During a physical examination of the claimant's back, Dr. London found that there was a full range of motion except for forward flexion. Dr. London concluded that the incident which occurred on July 29, 2000 while the claimant was working for CUT "aggravated" the pre-existing conditions in the claimant's back. Dr. London further concluded that the claimant could not predictably complete a routine work day on any sort of regular basis and for that reason is permanently and totally disabled.

On November 21, 2000, Dr. O'Hara examined the claimant and issued a report in which he noted that the claimant had "progressed satisfactorily" after receiving physical therapy and engaging in a home exercise program but continued to have low back pain after standing or walking for more than 30 minutes or sitting for more than 90 minutes. CX 54. The report further noted that the claimant had difficulty bending, lifting, or carrying and that he was taking four different medications, including Vicodin. Dr. O'Hara concluded that the claimant's condition had become permanent and stationary and that it precluded him from performing "any meaningful work activity," including work as a gate clerk. In explaining this conclusion, Dr. O'Hara commented that the claimant's lumbar pain would worsen to "severe" levels after only 15 to 90 minutes of light work involving only sitting or standing. In concluding the report, Dr. O'Hara determined that the claimant's disability constituted a 16 percent "whole person" impairment under the AMA Guides and noted that the claimant had volunteered "no complaints" referable to his cervical spine.

Sometime after the claimant's July 29, 2000 injury, the claimant sent an undated letter to Dr. O'Hara in which he informed Dr. O'Hara that he needed a report from Dr. O'Hara to complete an application for Social Security Disability benefits. CTX 17 at 286-87. In the letter, the claimant asserted that he was no longer capable of performing any of the various marine clerk jobs and set forth his reasons for believing that his March 10, 1998 injury prevented him from working as a floor runner, hatch clerk or dock clerk. He also represented that when he tried to perform these jobs, his supervisors would complain that he was taking too long. The letter further represented that in the five months preceding the claimant's July 29, 2000 injury, he worked "gates and towers only." Although the claimant described such work as being the easiest work available to marine clerks, he recounted that such jobs required so much sitting that he would experience "server [sic] pain" in his back and asserted that as a result, he "had to take vicodin and flexeril just to work." In the letter, the claimant also commented that "[m]ost of the nights I did work, I was able to leave early because the other clerks would 'carry" or do my duties as well as their own."

On December 20, 2000, Dr. Anthony Fenison, a board certified orthopedic surgeon, issued a report setting forth a summary of medical records concerning the claimant's treatment for the July 29, 2000 incident and describing the results of Dr. Fenison's November 13, 2000 orthopedic examination of the claimant. CX 58. According to Dr. Fenison, the physical examination indicated that the claimant had a normal range of motion in his cervical spine and that the claimant had no tenderness or spasms in his neck. Dr. Fenison also found that the claimant had a normal range of motion in his lumbosacral spine and that straight leg raising tests were negative in both the supine and

sitting positions. In concluding his report, Dr. Fenison commented that it was difficult to explain how bending over to pick up a piece of paper could have caused so much pathology that the claimant had to be off work for more than three months. Dr. Fenison further noted that there were "no objective findings" to support the claimant's subjective complaints and asserted that there had "never" been any truly "objective findings" according to the reports of Dr. O'Hara. Dr. Fenison therefore concluded that the claimant was engaging in "symptom magnification." Dr. Fenison conceded that it was "possible" that the July 29, 2000 incident was an aggravation of the claimant's 1998 injury, but added that such a possibility was not "medically probable" and asserted that the claimant's activities at the time of the July 29, 2000 incident "would not cause an acute disc herniation." He thus opined that there was "no new injury or trauma" during that incident. Dr. Fenison also concluded that there was no medical reason that would preclude the claimant from returning to his usual and customary duties as a marine clerk and opined that the claimant had no ratable impairment under the AMA Guides. Dr. Fenison also declared that the claimant's condition was permanent and stationary and asserted that if there had been any increase in symptoms on July 29, 2000, the claimant's condition had since returned to "baseline levels." Finally, Dr. Fenison concluded that consideration should be given to granting subsection 8(f) relief to CUT.

On December 28, 2000, Dr. O'Hara issued a supplemental report in which he noted that the claimant's symptoms after the July 29, 2000 injury were consistent with a nerve root compromise in the claimant's spine and with right-sided radiculopathy. CX 55. Dr. O'Hara also remarked that the substantial worsening in the claimant's condition that had followed "a very minor incident" demonstrated that the claimant's lumbar spine was in a vulnerable situation as a result of years of traumatic and degenerative changes. Dr. O'Hara also described the claimant's job as a marine clerk as being "economically stable and rewarding" and added that he saw "absolutely no reason" for the claimant to magnify his symptomatology. Dr. O'Hara further noted that he "completely disagreed" with the opinions set forth in Dr. Fenison's report of December 20, 2000.

The claimant never returned to work after the July 29, 2000 injury, and in December of 2000 he retired from the ILWU. Tr. at 147, CTX 22 at 23-24, 84.

ANALYSIS

SSA and the claimant have stipulated that: (1) the claimant sustained injuries to his back, right thumb and left elbow while employed by SSA on March 10, 1998, (2) that the March 10, 1998 injury occurred on a maritime situs while the claimant was employed in a maritime status, (3) that all alleged March 10, 1998 injuries occurred at a time when there was an employer-employee relationship between the claimant and SSA, (4) that the claimant's average weekly wage at the time of the March 10, 1998 injury was $2,643.10, (5) that the claimant was totally temporarily disabled from March 10, 1998 through December 11, 1998, and (6) that the claimant is now totally and permanently disabled. The claimant and SSA have disputes concerning the following issues: (1) whether the claimant suffered an injury to his neck during the March 10, 1998 accident, (2) the date that the March 10, 1998 injuries reached the point of maximum medical improvement, and (3) the extent of the claimant's residual earning capacity during the period between returning to work on December 12, 1998 and his July 29, 2000 accident while working for CUT.

CUT and the claimant have stipulated that: (1) any injury he may have suffered on July 29, 2000 reached the point of maximum medical improvement on November 21, 2000, (2) that the alleged July 29, 2000 injury occurred on a maritime situs while the claimant was employed in a maritime status, (3) that the alleged July 29, 2000 injury occurred at a time when there was an employer-employee relationship between the claimant and CUT, (4) that the claimant's actual wages in the 52 weeks before July 29, 2000 averaged $1826.82 per week, and (5) that the claimant is now totally and permanently disabled.

The following issues are in dispute between CUT and the claimant: (1) whether the claimant suffered a back injury arising out of and in the course of his employment on July 29, 2000, (2) the permanency of any injury suffered on that date, (3) the calculation of the claimant's average weekly wage for the alleged July 29, 2000 injury.

If it is determined that the claimant did in fact suffer a work-related injury on July 29, 2000, there are two additional issues in dispute: (1) the identity of the last responsible employer, and (2) the applicability of the Longshore Act's maximum benefit provisions.

Finally, both SSA and CUT seek Special Fund relief under the provisions of subsection 8(f) of the Longshore Act and seek credits for any benefit overpayments to the claimant.

Findings concerning each of these issues are set forth below.

1. Alleged March 10, 1998 Injury to the Claimant's Neck

Although SSA concedes that the claimant did suffer injuries to his back, right thumb, and left elbow during the March 10, 1998 accident, SSA disputes the claimant's allegation that the accident also caused an injury to the claimant's neck.

Insofar as the claimant contends that he suffered work-related injuries, he is aided by the provisions of subsection 20(a) of the Longshore Act, which provides that in proceedings to enforce a claim under the Act, "it shall be presumed, in the absence of substantial evidence to the contrary---(a) that the claim comes within the provisions of the Act...." In order to use this presumption to show a causal relationship between a claimant's job and his or her impairment, a claimant must produce evidence indicating that he or she suffered some harm or pain *and* that working conditions existed or an accident occurred that could have caused the harm or pain. *See Kelaita v. Triple A Machine Shop,* 13 BRBS 326 (1981). Thus, the presumption cannot be invoked if a claimant shows only that he or she suffers from some type of impairment. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608 (1982). However, only "*some* evidence tending to establish" both prerequisites is required and it is not necessary to prove such prerequisites by a preponderance of the evidence. *Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 296 n.6 (D.C. Cir. 1990)(emphasis in original). Once the subsection 20(a) presumption has been properly invoked, the relevant employer is given the burden of presenting "substantial evidence" to counter the presumed

relationship between the claimant's impairment and its alleged cause.[2] If the presumption is rebutted, it falls out of the case and the administrative law judge must weigh all of the evidence and resolve the issue based on the record as a whole. *Hislop v. Marine Terminals Corp.*, 14 BRBS 927 (1982). Under the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994), the ultimate burden of proof then rests on the claimant. *See also Holmes v. Universal Maritime Services Corp.*, 29 BRBS 18, 21 (1995). If the presumption is not rebutted with substantial evidence, a causal relationship between the worker's job and his or her impairment must be presumed.

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2. *Dower v. General Dynamics Corp.*, 14 BRBS 324 (1981). There is one court of appeals decision that appears to hold that medical testimony offered to rebut a subsection 20(a) presumption of causation is not sufficient to satisfy the requirements of the Act unless that testimony completely "rules out" any possible causal connection between a claimant's employment and the alleged disability. *See, e.g., Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 297 (11th Cir. 1990) (holding that the subsection 20(a) presumption was not rebutted because no physician had offered an opinion "ruling out a potential connection" between the claimant's medical condition and his employment). However, this standard has been applied only in the Eleventh Circuit and it has been explicitly rejected by both the First and Fifth Circuits. *Bath Iron Works v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997)(holding that an "employer need not rule out any possible causal relationship between the claimant's employment and his condition" because such a requirement "would go far beyond the substantial evidence standard set forth in the statute"); *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 690 (5th Cir. 1999)("unequivocally" rejecting a "'ruling out' standard" and noting that the text of subsection 20(a) requires only "substantial evidence" to rebut the presumption). Moreover, the Fourth and Seventh Circuits have implicitly rejected a "ruling out" standard by issuing decisions holding that all it takes to rebut a subsection 20(a) presumption is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *American Grain Trimmers, Inc. v. OWCP*, 181 F.3d 810, 817-18 (7th Cir. 1999); *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 263 (4th Cir. 1997).

In this case, the claimant's alleged work injuries occurred in the Ninth Circuit, which has not yet considered the argument that subsection 20(a) requires an employer to provide evidence completely ruling out even a hypothetical possibility of a causal relationship. However, the Ninth Circuit's most recent decision concerning the application of subsection 20(a) suggests that if the issue were to be presented, this circuit would join with the First, Fourth, Fifth and Seventh Circuits in rejecting any such standard. In that decision, *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615 (9th Cir. 1999), the court did not in any way suggest that medical evidence that fails to completely "rule out" even the possibility of causation is in any way insufficient or equivocal. Rather, the court expressed agreement with the Benefits Review Board's observation that unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. Moreover, the BRB has recently held that medical opinions that are within a "reasonable degree of medical certainty" cannot be rejected as being "equivocal" just because such opinions do not "rule out" even the hypothetical possibility of a causal relationship. *O'Kelley v. Department of the Army/NAF*, 34 BRBS 39, 41-43 (2000).

However, the subsection 20(a) presumption does not assist claimants in proving that any disability resulting from a work injury was in fact permanent. *Holton v. Independent Stevedoring Co.*, 14 BRBS 441 (1981); *Duncan v. Bethlehem Steel Corp.*, 12 BRBS 112 (1979). Nor can the subsection 20(a) presumption be invoked by one employer against another in a case when there is a dispute concerning the identity of the responsible employer. *Buchanan v. International Transportation Services*, 33 BRBS 32 (1999).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

To support his contention that his employment at SSA caused an injury to his neck, the claimant seems to be relying on his own testimony and on the testimony and reports of Dr. O'Hara. I find that such evidence is sufficient to warrant invocation of a subsection 20(a) presumption that the claimant suffered a work-related injury to his neck on March 10, 1998.

SSA contention that the claimant did not suffer a work-related injury to neck is based primarily on the testimony and reports of Dr. London and on the fact that the claimant failed to mention any injury to his neck when he was interviewed by a claims examiner on March 16, 1998. I find that this evidence is sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's neck impairment and his employment by SSA has been established by a preponderance of the evidence. After so considering the evidence, I conclude that a preponderance of the evidence indicates that the trauma that the claimant experienced while working for SSA on March 10, 1998 either caused, aggravated, accelerated, or otherwise permanently worsened the claimant's neck impairment and that SSA therefore bears responsibility for this impairment. In this regard, it is recognized that the claimant failed to mention any neck complaints when interviewed six days after

the March 10, 1998 accident and that Dr. London's reports fail to corroborate any neck complaints by the claimant in the months following the accident. However, this evidence is outweighed by the fact that Dr. O'Hara's reports repeatedly document the claimant's neck complaints. Moreover, Dr. O'Hara's reports and testimony indicate that in Dr. O'Hara's opinion, the claimant's March 10, 1998 accident did in fact cause a permanent neck impairment.

2. Date of Maximum Medical Improvement for the March 10, 1998 Injuries

A disability is considered permanent as of the date a claimant's condition reaches the point of maximum medical improvement or if the condition has continued for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-82 (1st Cir. 1979); *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984); *Phillips v. Marine Concrete Structures, Inc.*, 21 BRBS 233 (1988). The issue of whether a claimant's condition has reached the point of maximum medical improvement is primarily a question of fact and must be resolved on the basis of medical rather than economic evidence. *Williams v. General Dynamics Corp.*, 10 BRBS 915 (1979); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988); *Dixon v. John J. McMullen and Associates, Inc.*, 19 BRBS 243 (1986); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56 (1985). The mere possibility that a claimant's condition may improve in the future does not by itself support a finding that a claimant has not yet reached the point of maximum medical improvement. *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200 (1987). However, a condition is not permanent as long as a worker is undergoing treatment that is reasonably calculated to improve the worker's condition even if the treatment may ultimately be unsuccessful. *Abbott v. Louisiana Insurance Guaranty Ass'n*, 27 BRBS 192, 200 (1993), *aff'd sub. nom Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 126 (5th Cir. 1994).

In this case, the claimant contends that his March 10, 1998 injuries did not reach the point of maximum medical improvement until July 1, 1999. His primary support for this contention is the July 1, 1999 report of Dr. O'Hara. In contrast, SSA asserts that the claimant's March 10, 1998 injuries became permanent and stationary on November 6, 1998. This position is apparently based on the opinion set forth in Dr. London's report of his November 6, 1998 examination of the claimant.

For two reasons, I find the opinion of Dr. O'Hara to be more convincing that the opinion of Dr. London. First, Dr. O'Hara was the treating physician and examined the claimant more times after March of 1998 than Dr. London did. Second, unlike Dr. O'Hara, Dr. London failed to consider the claimant's neck impairment when determining if the claimant's condition had become permanent and stationary.

3. Extent of the Claimant's Earning Capacity between December 12, 1998 and July 29, 2000

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on the claimant to show that he or she cannot return to his regular employment due to his work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980);

Trask v. Lockheed Shipbuilding Co., 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. In determining if such job opportunities are realistically available, it is necessary to consider whether there exists a reasonable likelihood, given the claimant's age, education and background, that the claimant would be hired if he or she diligently sought the job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194 (9th Cir. 1988); *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990). However, an employer need not show the existence of specific and realistically available job opportunities if the employer itself offers the claimant a bona fide job that the claimant is capable of performing. *Peele v. Newport News Shipbuilding and Dry Dock Company*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 224, 226 (1986). Under the provisions of subsection 8(c)(21) of the Act, an injured worker's compensation must be based on the difference between the worker's pre-injury average weekly wage and his or her post-injury earning capacity. In addition, subsection 8(h) of the Act provides that when an injured worker has been employed following an injury, the worker's actual post-injury earnings shall be considered indicative of his or her post-injury earning capacity, if such actual earnings "fairly and reasonably represent" the worker's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, 660 (1979). Whichever party contends that actual post-injury earnings are not representative of a claimant's true wage-earning capacity has the burden of proving that those earnings are not representative. *Burch v. Superior Oil Co.*, 15 BRBS 423, 427 (1983); *Bethard v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 691, 693 (1980). As well, the party contending that a claimant's post-injury wages are not representative has the burden of establishing an alternative wage earning capacity. *Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1988), *aff'd sub nom. J.M.Martinac Shipbuilding v. Director, OWCP*, 900 F.2d 180 (9th Cir. 1990).

In this case, the claimant asserts that after his March 10, 1998 injury he was no longer capable of performing all of the various jobs that he had been able to perform prior to the injury. As a result, he alleges, his average weekly earning capacity declined from $2,643.10 to $1,871.92—an amount which allegedly reflects his average weekly earnings between his return to work on December 12, 1998 and his July 29, 2000 injury at CUT. Both SSA and CUT argue that the claimant's evaluation of his earning capacity is incorrect. In this regard, SSA contends that the claimant did not in fact suffer any permanent loss of wage earning capacity and further asserts that, in any event, the claimant's average weekly earnings between December 12, 1998 and July 29, 2000 were at least $2,020.35 and may have been even more than his pre-injury earnings. In contrast, CUT argues that the claimant's actual wages between December of 1998 and July 29, 2000 do not fairly and reasonably represent his true earning capacity. According to CUT, the actual wages are unrepresentative of the claimant's true wage-earning capacity because the claimant was making an "extraordinary effort" to work and was being "carried" in his job by his co-workers. For these reasons, CUT alleges, the claimant's actual earnings should be discounted by at least 30 percent.

A. SSA's Assertion that the Claimant Suffered Little or No Loss of Wage Earning Capacity

SSA's argument that the claimant's March 10, 1998 injury caused little or no loss of wage earning capacity is based on Dr. London's opinion that the claimant's work restrictions after the March 10, 1998 injury were no greater than the work restrictions that had been imposed on him after his previous injuries. For two reasons, I find this opinion to be unconvincing. First, it is inconsistent with the opinion of the treating physician, Dr. O'Hara. *See* CX 20 (report of Dr. O'Hara). Second, Dr. London's opinion is inconsistent with the claimant's credible testimony that there was a permanent increase in his symptoms after the March 10, 1998 accident. Tr. at 188, 206 (testimony of the claimant).

B. CUT's Assertion that the Claimant's Actual Wages Overstate His Earning Capacity

In brief, CUT contends that the claimant's actual earnings between December of 1998 and July of 2000 are not representative of his true earning capacity because during that period the claimant benefitted from the beneficence of other workers and was making an extraordinary effort to work.

It is well established as a matter of law that the actual post-injury wages of an injured worker are not a valid measure of the worker's true earning capacity if the wages were earned in a job that constituted "sheltered employment" or if the worker was in fact being "carried" by other workers. *See Harrod v. Newport News Shipbuilding and Dry Dock Company*, 12 BRBS 10 (1980) (decision acknowledging the general rule that an injured worker's post-injury earnings are not representative of the worker's true earning capacity if the claimant's job constituted sheltered employment); *Harris v. Atlantic & Gulf Stevedores, Inc.*, 9 BRBS 7 (1978) (holding that the wages of a worker who is being "carried" in the performance of his job duties by other workers are not indicative of the worker's true wage earning capacity). Likewise, an injured worker's post-injury wages are not an accurate representation of the worker's actual earning capacity if the worker was able to work only through "extraordinary effort and in spite of excruciating pain." *Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978).

As already explained, the claimant's testimony indicates that when he first returned to work in December of 1998 he had substantial difficulty performing the various yard and dock jobs he had previously performed and that on a number of occasions he was in fact "carried" by co-workers. Hence, I find that his earnings in these jobs were not representative of his actual post-injury earning capacity. However, the claimant's testimony also indicates that after he decided to limit his employment to gate and tower jobs, his earnings were in fact representative of his true earning capacity. For example, during the trial he testified that after he limited himself to gate and tower jobs he was no longer being "carried" by his fellow workers and could perform his work if he took pain medication.[3] Tr. at 120, 220-222. In this regard it is noted that the mere fact that the claimant used

3. In this regard, it is noted that the claimant's undated letter to Dr. O'Hara might be interpreted as indicating that the claimant was being "carried" by his co-workers until the day of his final injury on July 29, 2000. However, the note is ambiguous concerning the time period when he was being "carried" by other workers and was not verified under oath. In contrast, the claimant's

some medications and experienced some pain while working as a gate or tower clerk does not mean that his earnings from these jobs were not representative of his true earning capacity. Rather, under the *Haughton Elevator* decision, such a finding would be warranted only if his work efforts were in fact "extraordinary." *See also Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82, 84 (1986) (holding that merely taking medication and experiencing some pain while working is not enough to warrant a conclusion that a claimant was unable to return to his usual job).

The claimant's trial and deposition testimony indicates that he is unsure about exactly when he gave up his efforts to perform the more rigorous marine clerk jobs and decided to limit himself to gate and tower jobs. However, as previously explained, it appears from the claimant's payroll records that this event occurred during the early part of September of 1999. Accordingly, it has been determined that the claimant's actual earnings during the period between September 12, 1999 and July 29, 2000 are the best indication of the claimant's true earning capacity following his March 10, 1998 injury. According to the claimant's payroll records, during this 46-week period he earned a total of $86,235.15----an average of $1874.68 per week. *See* CX 64 at 391-95 (the foregoing calculation includes holiday pay but excludes $203.93 in retroactive payments for work performed prior to September 12, 1999). It is thus concluded that the claimant's March 10, 1998 injury caused his weekly wage earning capacity to decline from an average of $2,643.10 to $1,874.68.

As previously explained, although the claimant returned to work on December 12, 1998, his March 10, 1998 work injuries did not reach the point of maximum medical improvement until July 1, 2000. Therefore, the claimant is entitled to receive temporary partial disability benefits for the period between December 12, 1998 and June 30, 1999. None of the parties has contended that the claimant's true residual earning capacity during the period between December 12, 1998 and June 30, 1999 differed materially from his earning capacity between July 1, 1999 and July 29, 2000. Nor does it seem likely that any such difference actually existed. Accordingly, for the reasons set forth above I find that during the entire period between December 12, 1998 and July 29, 2000, the claimant had a residual weekly earning capacity of $1,874.68. However, before calculating a claimant's entitlement to disability benefits for the March 10, 1998 injury, this amount must be adjusted to account for any wage inflation between the date of the work injury and the date that the claimant was able to return to work. *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691, 695 (1980); *Walker v. Washington Metropolitan Area Transit Authority*, 793 F.2d 319, 321 (D.C. Cir. 1986). Ordinarily, this adjustment should be made by determining the wage level that prevailed for the alternative employment at the time of the claimant's work-related injury. However, no such evidence is contained in this record. Accordingly, the necessary adjustment must be made by decreasing the claimant's post-injury wage earning capacity by an amount proportionate to the increase in the National Average Weekly Wage (NAWW) between the date of the claimant's work injury and the date he returned to work. *Richardson v. General Dynamics Corp.*, 23 BRBS 327 (1990). Data published by the Department of Labor show that the NAWW increased from $417.87 on October 1, 1997 to $435.88 on October 1, 1998. Therefore, when adjusted to reflect the changes in the NAWW,

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trial testimony was under oath and specifically indicates that he was not "carried" when he worked as a gate clerk. Tr. at 220-222.

the claimant's residual weekly wage earning capacity of $1,874.68 was equivalent to a weekly wage of $1,797.22 in March of 1998. The claimant's inflation-adjusted loss of wage earning capacity is thus $845.88 per week (his stipulated average weekly wage of $2,643.10 minus $1,797.22). Therefore, under the provisions of subsection 8(e) of the Act he is entitled to receive temporary partial disability benefits of $563.95 per week for the period of temporary partial disability that began on December 12, 1998 and ended on June 30, 1999. Likewise, under the provisions of subsection 8 (c) of the Act, on July 1, 1999 he became entitled to receive permanent partial disability benefits of $563.95 per week.

4. July 29, 2000 Injury to the Claimant's Back as a Natural Progression of Prior Conditions

The claimant and SSA contend that the claimant suffered a new injury while working for CUT on July 29, 2000. In contrast, CUT contends that the July 29, 2000 incident was merely a natural progression of the claimant's pre-existing impairments.

The argument that the claimant suffered a new injury is supported by the claimant's testimony describing a substantial worsening of his back symptoms after July 29, 2000 and by the opinions of Dr. O'Hare and Dr. London. *See* Tr. at 134-43, 238 (claimant's testimony), CX 65 at 46-55 (deposition testimony of Dr. O'Hara that on July 29, 2000 "something happened" that "resulted in permanent damage" to one of the claimant's "desiccated disks"), CX 54 (report of Dr. O'Hara), CX 57 at 269 (report of Dr. London). I find that this evidence is sufficient to warrant invocation of a subsection 20(a) presumption that the claimant suffered a work-related back injury while employed by CUT on July 29, 2000.

CUT's contention that there was no new injury on July 29, 2000 is supported by Dr. Fenison, who opined in his report of December 20, 2000 that the claimant had not suffered any new injury. CX 58 (report of Dr. Fenison). I find that this evidence is sufficient to rebut the subsection 20(a) presumption.

Because it has been determined that the presumption of causation has been rebutted, it is necessary to consider all of the relevant evidence to determine if a causal relationship between the claimant's back impairment and his employment by CUT has been established by a preponderance of the evidence. After so considering the evidence, I conclude that a preponderance of the evidence indicates that the claimant's sudden movement of his back while employed by CUT on July 29, 2000 aggravated, accelerated, or otherwise permanently worsened the claimant's back impairment and that CUT therefore bears responsibility that impairment. In this regard, substantial weight has been given to the opinion of Dr. O'Hara and to the claimant's credible testimony that his back condition was materially worse after July 29, 2000.

5. Permanency of the July 29, 2000 Back Injury

The claimant contends that the work injury he suffered on July 29, 2000 was permanent in nature and that he is therefore entitled to permanent disability benefits from the agreed-upon date of

maximum medical improvement: November 21, 2000. CUT, on the other hand, contends that any impairment from the July 29, 2000 injury was only temporary in nature.

The contention that the July 29, 2000 injury resulted in a permanent impairment is supported by the claimant's testimony that his back pain was worse and more frequent after the injury. *See* Tr. at 142-43, 238 (claimant's testimony that his pain was worse and more frequent after the July 29, 2000 injury). In addition, both Dr. O'Hare and Dr. London have opined that the injury resulted in a permanent increase in the claimant's impairments. CX 65 at 46-47(opinion of Dr. O'Hara that the July 29, 2000 injury permanently increased the claimant's pain symptoms), CX 57 at 268-69 (opinion of Dr. London that the July 29, 2000 injury caused the claimant's partial disability to become a total and permanent disability).

CUT has attempted to counter the foregoing evidence with arguments that the claimant's testimony is contradictory and actually indicates that his back pain did not measurably increase after July 29, 2000. In addition, CUT apparently relies on Dr. Fenison's opinion that if the claimant did suffer any injury on July 29, 2000, it caused only a temporary impairment. CX 58 at 277 (opinion of Dr. Fenison that even if the July 29, 2000 incident caused the claimant's symptoms to "flare," the claimant's condition later returned to "baseline levels" and that the incident did not cause any permanent increase in the claimant's disability).

On balance, I find that the opinions of Dr. O'Hara and Dr. London are more convincing that the opinion of Dr. Fenison, who examined the claimant on only one occasion. Although testimony in which the claimant attempted to quantify the severity of his impairment is somewhat confusing, his testimony that there was a permanent worsening of his condition after July 29, 2000 is nonetheless credible. Accordingly, I find that the July 29, 2000 injury resulted in a permanent increase in the claimant's back impairment.

6. Average Weekly Wage at the time of the July 29, 2000 Injury

The claimant and CUT have stipulated that the claimant's actual earnings in the 52 weeks prior to July 29, 2000 averaged $1,826.82 per week. Although the claimant contends that these actual earnings should be used to calculate his average weekly wage for the July 29, 2000 injury, CUT contends that these wages are not representative of the claimant's true wage-earning capacity. According to CUT, these wages are unrepresentative because they were earned during periods when the claimant was being "carried" by his co-workers and making an "extraordinary effort" to continue working.

As previously explained, the weight of the evidence indicates that the claimant was in fact "carried" by his co-workers until the time he decided to limit his work activities to gate and tower jobs. This event occurred on or about September 12, 1999. Thus, some of the wages earned by the claimant in the 52 weeks before his July 29, 2000 injury were not in fact representative of his true wage-earning capacity (i.e., the wages earned between July 29, 1999 and September 11, 1999). Accordingly, it has been decided that only the wages earned in the 46 weeks between September 12, 1999 and July 29, 2000 should be used to calculate the average weekly wage for the July 29, 2000

injury. As previously explained, during this 46-week period, the claimant earned a total of $86,235.15, or an average of $1,874.68 per week. Hence, the claimant's average weekly wage for the July 29, 2000 injury is $1,874.68.

7. Last Responsible Employer

Under the Longshore Act's so-called "last responsible employer rule" a single employer can be held liable for the totality of an injured worker's disability, even though the disability may be attributable to a series of injuries that the worker suffered while working for different employers. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978). The rule is designed to avoid the expense and complications that would be inherent in any effort to apportion liability among employers according to their individual contributions to a worker's disability. *Id.* at 1336; *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2nd Cir. 1955). When applying the last responsible employer rule, the Ninth Circuit has utilized two distinct tests to determine which of an injured worker's employers will be held liable for all of the worker's disability.

The first test applies in cases involving disabilities that are categorized as occupational diseases and the second test applies in cases involving disabilities that are the result of multiple or cumulative traumas. *Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 623-24 (9th Cir. 1991). Under the rule which applies in occupational disease cases, the responsible employer is the employer which last exposed the worker to potentially injurious stimuli prior to the date upon which the worker became aware that he or she was suffering from an occupational disease arising from his or her employment. *See Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-41 (9th Cir. 1991); *Kelaita v. Director, OWCP*, 799 F.2d 1308, 1311 (9th Cir. 1986). Under this rule, it is unnecessary to show that there was an actual causal relationship between the potentially injurious stimuli and the claimant's impairment, so long as it is at least theoretically possible for the potentially injurious stimuli to have contributed to the impairment. 932 F.2d at 840-41. However, under a recent decision of the Ninth Circuit, the last employer to expose a worker to potentially injurious stimuli will not be responsible for all of a worker's occupational disability if, at the time of the last injury, the same worker had a meritorious claim pending against a prior employer for the same type of occupational disease. *See Stevedoring Services of America v. Director, OWCP*, 297 F.3d 797 (9th Cir. 2002). In such situations, the court held, liability for payment of benefits must be divided between the employers according to their respective contributions to the claimant's total work-related disability.

In contrast to the rule that applies in occupational disease cases, under the rule which applies in traumatic injury cases the identity of the responsible employer depends upon the actual cause of the worker's ultimate disability. On one hand, if the worker's ultimate disability is the result of the natural progression of a traumatic injury and would have occurred notwithstanding the subsequent injury or injuries, the employer that employed the worker on the date of the initial injury is the responsible employer. On the other hand, if the worker's ultimate disability is at least partially the result of a new traumatic injury that aggravated, accelerated, or combined with a prior injury to create the disability, the employer that employed the worker at the time of the new injury is the responsible employer. *Foundation Constructors, supra,* at 624.

In this case, the claimant has established that his back condition was permanently worsened by a work-related injury that occurred while he working for CUT on July 29, 2000. Thus, because this injury was traumatic and not the result of any alleged occupational disease,[4] it would appear that the responsible employer is CUT. However, CUT argues that it cannot be found to be the last responsible employer because the claimant's July 29, 2000 injury was foreseeable. In particular, CUT argues that this conclusion is supported by the decision of the United States Court of Appeals for the Seventh Circuit in *Jones v. Director, Office of Workers' Compensation Programs*, 977 F.2d 1106 (7th Cir. 1992). That decision concerned a worker who had injured his back while working for a Longshore Act employer and later worsened his back condition while performing work for another employer, which was not a party to the proceeding before the Seventh Circuit and was apparently not subject to the Longshore Act. The court held that even though the claimant may have been negligent in performing work for the second employer that was beyond his physical capacity, the Longshore Act employer was still responsible for the resulting aggravation of the claimant's back condition because the claimant's negligent conduct was "foreseeable" and therefore not a supervening event.

There are two fallacies in CUT's argument that the *Jones* decision renders SSA liable for the injury that the claimant suffered while working for CUT on July 29, 2000.

First, CUT fails to recognize that only one of the employers in the *Jones* case was subject to the Longshore Act and that therefore the Seventh Circuit's *Jones* decision did not in any way involve the last responsible employer doctrine, which is only applicable when there is more than one employer subject to provisions of the Longshore Act. *See Todd Shipyards v. Black*, 717 F.2d 1280, 1285 (9th Cir. 1984)(holding that the Longshore Act and similar workers' compensation statutes "have been clearly and consistently interpreted to impose liability on the *last employer covered* by the applicable statute")(emphasis in original). Indeed, it is clear from the text of the *Jones* decision that there was no responsible employer issue in that case and that the only issue before the court of appeals was the

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4. The generally accepted definition of an occupational disease is "any disease arising out of exposure to harmful conditions of the employment, when those conditions are present in a peculiar or increased degree in comparison with employment generally." *Port of Portland v. Director, OWCP*, 192 F.3d 933, 939 (9th Cir. 1999) (noting, *inter alia,* that walking is not an activity particular to work of a longshoreman). *See also Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 176 (2nd Cir. 1989) (citing 1B Larson, *The Law of Workmen's Compensation* §41.00 at 7-353); *Steed v. Container Stevedoring Company*, 25 BRBS 210, 215 n. 2 (1991). Although a few state courts have held that cumulative trauma is a type of occupational disease, the Ninth Circuit has a different view. For example, in *Foundation Constructors* the Ninth Circuit explicitly concluded that a back condition that resulted from repeatedly operating jackhammers and lifting 100-pound weights did not constitute an occupational disease. 950 F.2d at 624. Similarly, in *Kelaita* the Ninth Circuit upheld the Benefits Review Board's decision that cumulative trauma to a claimant's arm did not amount to an occupational disease. 799 F.2d at 1311-12.

question of whether the supervening cause doctrine absolved the Longshore Act employer from liability for the worsening of the claimant's back condition.

Second, on none of the many occasions when the Ninth Circuit has described the last responsible employer doctrine has it ever held that an employer at the time of a second injury could escape liability merely because such a second injury was foreseeable. Rather, the court's decisions indicate that the second employer can escape liability only if the worker's final impairment was solely the result of the "natural progression" of an earlier injury. Although it is true that the natural progression of a prior injury is usually foreseeable, this does not mean that all foreseeable future injuries are the result of a natural progression. Moreover, there is no reason to conclude that new injuries should be considered part of the natural progression of a prior injury, even if such new injuries are in some way foreseeable. It should also be noted that if CUT's foreseeability test were to be applied in this case, SSA could argue that responsibility for the claimant's March 10, 1998 injury should be shifted to one of the employers for whom the claimant was working at the time of his 1980, 1991 and 1995 injuries. Indeed, if CUT's test were generally applied the last responsible employer rule could gradually become the *first* responsible employer rule.

8. Application of the Longshore Act's Maximum Benefit Provisions

Because the claimant's July 29, 2000 injury while working for CUT caused the claimant to become totally and permanently disabled, under the usual operation of the Longshore Act, he would be entitled to recover permanent total disability benefits of $901.28 per week from CUT.[5] In addition, he would also be entitled to receive permanent partial disability benefits of $563.95 per week from SSA for the impairments resulting from his March 10, 1998 injury. Hence, he would receive weekly benefits totaling $1,465.23. However, the defendants contend that if the claimant were allowed to simultaneously receive the full amount of both benefits, he would be receiving benefits in excess of Longshore Act maximums.

In particular, the defendant employers appear to be relying on the provisions of subsection 6(b)(1) of the Act which specify that compensation for disability under the Act shall not be more than twice the National Average Weekly Wage (NAWW), which at the time of the claimant's last injury was $450.64. In addition, the defendants rely on the Ninth Circuit's decision in *Brady Hamilton Stevedore Company v. Director, Office of Workers' Compensation Programs*, 58 F.3d 419 (9th Cir. 1995). In that decision, the Ninth Circuit held that the Benefits Review Board erred in issuing a decision that allowed an injured worker who had suffered two separate work injuries to receive a

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5. In this regard, it is noted that ordinarily a longshore worker who has become permanently and totally disabled by a work injury is entitled to receive benefits equal to two-thirds of his or her average weekly wage at the time of the injury. However, under the provisions of subsection 6(b)(1) of the Act, benefits cannot exceed twice the National Average Weekly Wage (NAWW) at the time of the injury. On July 29, 2000, the NAWW was $450.64. Thus, in this case the claimant cannot receive permanent total disability benefits of more than $901.28, even though his average weekly wage at the time of his July 29, 2000 injury was $1,874.68.

combination of permanent partial and permanent total disability benefits that exceeded two-thirds of the worker's average weekly wage. According to the Ninth Circuit's decision, the combination of awards amounted to "double dipping" and violated the provision of subsection 8(a) of the Act that specifies that benefits for total permanent disability shall be equal to two-thirds of an injured worker's average weekly wage.

For the following reasons, I find that neither the provisions of subsection 6(b)(1) of the Act nor the *Brady Hamilton* decision preclude the claimant from simultaneously receiving both the permanent partial disability benefits awarded for the March 10, 1998 injury and the total permanent disability benefits awarded for the July 29, 2000 injury.

First, although the claimant's permanent partial and permanent total disability awards in combination exceed the $901.28 maximum under subsection 6(b)(1), the case law indicates that this maximum is intended to apply only to single injuries and does not apply when an injured worker is simultaneously entitled to receive benefits for more than one injury. *See Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 91 (D.C. Cir. 1980); *Codd v. Stevedoring Services of America*, 31 BRBS 134, 145-49 (ALJ 1996) (decision noting that the Director of the Office of Workers' Compensation Programs interprets the maximum rate provision of subsection 6(b)(1) as being inapplicable to situations where a claimant is entitled to more than one award). *See also ITO Corp. v. Director, Office of Workers' Compensation Programs*, 883 F.2d 423 (5th Cir. 1989).

Second, although the Ninth Circuit's decision in *Brady Hamilton* does explicitly state that if the combination of awards for two separate injuries exceeds two-thirds of an injured workers' average weekly wage, there would be "double dipping" in violation of subsection 8(a) of the Act, this statement appears to be inconsistent with the last two paragraphs of the decision. In those paragraphs, the court recognized that a determination of the extent of any "double dipping" depended on then-unmade factual findings concerning the cause of an *increase* in the claimant's income between the first and second injuries----a type of factual findings that the court recognized could be made only by an administrative law judge. These last two paragraphs also appear to implicitly recognize that if the increase in income was attributable solely to factors other than an increase in earning capacity (e.g., inflation-induced increases in hourly wage rates), there would not be any "double dipping" requiring adjustment of either of the two awards. Significantly, in this case there was no increase in the claimant's income between the first and second injuries. Rather, there was a $768.42 *decrease* in earnings. Moreover, the combination of the amounts awarded in permanent partial and total disability benefits ($1,465.23) do not in fact exceed two thirds of the claimant's initial average weekly wage of $2,643.10. Hence, there is no danger of "double dipping" and the holding in *Brady Hamilton* does not apply. *See Codd v. Stevedoring Services of America*, 31 BRBS 134, 145 (ALJ 1996).

9. Entitlement to Special Fund Relief

In order to obtain relief from the Special Fund under subsection 8(f) of the Act, an employer must show: (1) that the claimant had a permanent partial disability prior to his or her work-related injury, (2) that the pre-existing disability was manifest prior to that injury, and (3) that the pre-existing

disability contributed to the claimant's ultimate permanent disability in the specific manner prescribed in the Act. *Director, OWCP v. Campbell Industries, Inc.*, 678 F.2d 836 (9th Cir. 1982). In this case, the Director concedes that the first two requirements have been met by both SSA and CUT, but declines to concede that the third requirement has also been satisfied. SSX 7, CTX 5.

In brief, the third requirement for obtaining subsection 8(f) relief has two elements. First, it must be shown that the claimant's ultimate disability is not due solely to the subsequent injury, regardless of whether the ultimate permanent disability is either partial or total. *See* 20 C.F.R. §702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, subsection 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *See FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990). Second, when an ultimate permanent disability is only partial rather than total, the employer must also establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. *See* 20 C.F.R. §702.321(a)(1).

In an effort to show that these requirements have been satisfied, SSA and CUT have cited the reports and deposition testimony of Dr. London, Dr. O'Hara, and Dr. Fenison. SSX 24 at 674-75 (testimony of Dr. London), CX 34 (report of Dr. London), CX 65 at 48 (testimony of Dr. O'Hara), CTX 9 (report of Dr. O'Hara) and CTX 7 (report of Dr. Fenison). I find that this evidence is more than sufficient to show that the foregoing contribution requirements have been met and therefore find that both SSA and CUT are entitled to relief under subsection 8(f) of the Act.

ORDER

1. Stevedoring Services of America shall pay the claimant temporary total disability compensation for the period beginning on March 10, 1998 and ending on December 11, 1998 at a weekly compensation rate of $835.74.

2. Stevedoring Services of America shall pay the claimant temporary partial disability compensation for the period beginning on December 12, 1998 and ending on June 30, 1999 at a weekly compensation rate of $563.95.

3. Stevedoring Services of America shall pay the claimant permanent partial disability compensation for the period beginning on July 1, 1999 and ending 104 weeks thereafter at a weekly compensation rate of $563.95.

4. Beginning 104 weeks from July 1, 1999 and until ordered otherwise, the Special Fund shall pay the claimant permanent partial disability compensation at a weekly compensation rate of $563.95.

5. CUT shall pay the claimant temporary total disability compensation for the period beginning on July 29, 2000 and ending on November 20, 2000 at a weekly compensation rate of $901.28.

6. For 104 weeks beginning on November 21, 2000 CUT shall pay the claimant permanent total disability compensation at a weekly compensation rate of $901.28, plus annual increases pursuant to subsection 9(f) of the Act.

7. Beginning 104 weeks from November 21, 2000 and until ordered otherwise, the Special Fund shall pay the claimant permanent total disability compensation at a weekly compensation rate of $901.28, plus annual increases pursuant to subsection 9(f) of the Act.

8. Stevedoring Services of America and CUT shall receive credit for all compensation paid to the claimant since March 10, 1998.

9. Stevedoring Services of America, CUT, and the Special Fund shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.

10. The District Director shall make all calculations necessary to carry out this order.

11. Stevedoring Services of America shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of his right thumb, left elbow, back and neck injuries of March 10, 1998.

12. CUT shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of his back injury of July 29, 2000.

13. Counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for SSA and CUT within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, counsel for SSA and CUT shall initiate a verbal discussion with counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the three counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, counsel for the claimant shall within 30 calendar days after the date of service of the initial fee petition provide the undersigned and the counsel for SSA and CUT with a Final Application

for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the SSA and CUT and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for SSA and CUT shall each file a Statement of Final Objections and serve a copy on counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge